NO. 48721-7

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON MILLER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 15-1-02161-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is the defendant entitled to relief when he did not raise an objection to the criminal filing fee when it was imposed and, even if this court does reach the merits of his claim, should this court find, consistent with its prior caselaw, that the criminal filing fee is a mandatory legal financial obligation? (Defendant's Assignment of Error No. 1)

2. Should this court address the matter of appellate costs only if the State prevails?

B. STATEMENT OF THE CASE[1].

On January 29, 2016, Jason Miller, hereinafter "defendant" was sentenced to three counts of identity theft in the second degree, two counts of possessing stolen property in the second degree, four counts of forgery, and unlawful possession of a controlled substance. CP 50-65. The defendant received a sentence under the drug offender sentencing alternative and received a sentence of 25 months in custody followed by 25 months of community custody. *Id.*

As part of sentencing, the trial court ordered a $500.00 crime victim penalty assessment, $200.00 court costs, and a $100 DNA testing

[1] The only issue raised by the defendant relates to the criminal filing fee imposed at the time of sentencing. Therefore, the State will confine its statement of facts to that single issue.

fee. RP 339. The trial court conducted a hearing pursuant to ***Blazina***[2] and thereafter waived the $1000.00 Department of Assigned Counsel recoupment. *Id.* The defendant did not object to the trial court's imposition of the court costs, also known as a criminal filing fee. RP 339; CP 50-65.

This timely appeal follows.

C. ARGUMENT.

1. THIS COURT SHOULD DECLINE TO REVIEW THE TRIAL COURT'S IMPOSITION OF THE MANDATORY $200 CRIMINAL FILING FEE AT SENTENCING BECAUSE DEFENDANT FAILED TO OBJECT AND PRESERVE THE ISSUE BELOW AND THIS COURT HAS ALREADY DETERMINED THAT THE FILING FEE IS A MANDATORY COST.

a. The issue was not preserved below.

Defendant argues that, while the trial court conducted a hearing regarding the defendant's future ability to pay, the trial court erred in finding that the criminal filing fee was mandatory. Brief of Appellant at page 3. Defendant did not challenge the imposition of any of his legal financial obligations at the time of his sentencing. *See* RP 339. Defendant's failure to object should preclude this court from reviewing the issue on appeal, as defendant waived his right to raise any issue regarding his legal financial obligations.

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[2] ***State v. Blazina***, 182 Wn.2d 827, 344 P.3d 680 (2015).

Generally, the appellate court will not consider a matter raised for the first time on appeal. ***State v. Kirkman***, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An exception exists for claims of error that constitute manifest constitutional error. RAP 2.5(a)(3). If a cursory review of the alleged error suggests a constitutional issue, then defendant bears the burden to show the error was manifest. ***State v. Lynn***, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Error is "manifest" if defendant shows that he was actually prejudiced by it. If the court reaches the merits of the claimed error it may still be harmless. ***Kirkman***, 159 Wn.2d at 927.

In ***Blazina***, the Washington State Supreme Court determined the Legislature intended that prior to the trial court imposing discretionary legal financial obligations, there must be an individualized determination of a defendant's ability to pay. ***State v. Blazina,*** 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Supreme Court based its reasoning on its reading of RCW 10.01.160(3), which states,

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Blazina, 182 Wn.2d at 837-38. *See* RCW 10.01.160(3).

Therefore, to comply with ***Blazina***, a trial court must engage in an inquiry with a defendant regarding his or her individual financial

circumstances and make an individualized determination about not only the present but also the future ability of that defendant to pay the requested discretionary legal financial obligations before the trial court imposes them. ***Blazina***, 182 Wn.2d at 837-38. The Supreme Court also suggested that trial courts look to GR 34 for guidance when evaluating whether a defendant has the means available to pay discretionary legal financial obligations. *Id.* at 838.

Under GR 34, a person who receives assistance under a needs-based, means-tested assistance program is considered indigent for purposes of qualifying for court-appointed counsel. GR 34(3). GR 34 also discusses the federal poverty level, living expenses, and other compelling circumstances as considerations for qualifying for court-appointed counsel. *Id.*

Defendant does not address his burden of proof under RAP 2.5 apart from stating this court may review the claimed error, and that in light of ***Blazina***, the "broken" LFO system, and to promote justice and facilitate deciding the case on its merits, this court should address the LFO issues defendant is raising. Brief of Appellant at 6-7. The error was not preserved.

Here, there was no objection to the imposition of the costs and fees, including the criminal filing fee. RP 339. Further, defendant has not

shown the alleged error regarding the imposition of a discretionary LFO is of manifest constitutional magnitude that can be raised for the first time on appeal.

This court should exercise its discretion to not entertain defendant's unpreserved argument that the trial court did not make a proper inquiry regarding his ability to pay his legal financial obligations and should affirm the trial court's imposition of the legal financial obligations.

b. Even if this court were to reach the merits of the defendant's claim, the $200 criminal filing fee is mandatory.

The State maintains, as argued above, that defendant has not preserved any issue in regards to legal financial obligations, as there was no objection to any of the legal financial obligations when the trial court imposed them. Additionally, contrary to defendant's assertion, the criminal filing fee is mandatory. This court should continue to adhere to its holding in ***State v. Lundy***, 176 Wn. App. 96, 308 P.3d 755 (2013), as defendant has not shown that ***Lundy*** is incorrect and harmful.

This Court reviews the purpose and meaning of statutes de novo. ***State v. Munoz-Rivera***, 190 Wn. App. 870, 884, 361 P.3d 182 (2015). The statute in regards to the criminal filing fee is clear and unambiguous. RCW 36.18.020 states,

> (2) Clerks of superior courts shall collect the following fees for their official services:
> ...
>
> (h) Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.

The courts will not employ judicial interpretation if a statute is unambiguous. ***State v. Steen***, 155 Wn. App. 243, 248, 228 P.3d 1285 (2010). "A statute is ambiguous when the language is susceptible to more than one interpretation." ***Steen,*** 155 Wn. App. at 248. When the reviewing court is interpreting a statute, its "goal is to ascertain and give effect to the intent and purpose of the legislature in creating the statute." ***State v. Stratton***, 130 Wn. App. 760, 764, 124 P.3d 660 (2005) (citation and internal quotations omitted). The court looks to the plain language in the statute, the context of the statute, and the entire statutory scheme to determine the legislative intent. ***Steen***, 155 Wn. App. at 248; ***Stratton***, 130 Wn. App. at 764 (citations omitted). If the statute fails to provide a definition for a term, then the courts look to the standard dictionary definition of the word. ***Stratton***, 130 Wn. App. at 764. If the court finds that a statute is ambiguous, then "the rule of lenity requires that we

interpret it in favor of the defendant absent legislative intent to the contrary." *Id.* at 765.

Here, the plain language of the statute is clear: the Clerk **shall** collect upon a conviction or plea of guilty the criminal filing fee, which is set in the amount of 200 dollars, as the defendant is liable for the fee. RCW 36.18.020(2)(h) (emphasis added). Shall is mandatory, not discretionary. This Court held the criminal filing fee to be mandatory. ***Lundy,*** 176 Wn. App. at 102. Since ***Lundy***, Division Three has also stated the criminal filing fee is mandatory. *See* ***State v. Stoddard***, 192 Wn. App. 222, 225, 366 P.3d 474 (2016); ***State v. Clark***, 191 Wn. App. 369, 374, 362 P.3d 309 (2015). The criminal filing fee is mandatory and it was properly imposed, regardless of defendant's ability to pay.

Defendant has not made the requisite showing that ***Lundy,*** or ***Stoddard*** and ***Clark***, are wrongfully decided or that the finding the criminal filing fee is mandatory is incorrect and harmful. Defendant argues "shall be liable" does not mean the fee is mandatory given that it can mean a "future possible or probable happening that may not occur." Brief of Appellant at 28. This is an absurd interpretation of the plain language of the statute. Liable, in this context, means that defendant is "responsible or answerable in law; legally obligated" to pay; or subject to the $200 fine. BLACK'S LAW DICTIONARY 1055 (10TH ed. 2014).

The statute mandating the Clerk to collect the criminal filing fee, for which defendant is now liable, is not logical if the imposition of the fee is not mandatory. The Clerk cannot collect the fee if the court does not impose it.

There is nothing harmful or incorrect about this Court's decision that the criminal filing fee is mandatory, and this Court should continue to follow ***Lundy***. Therefore, the trial court's imposition of the criminal filing fee, regardless of whether it made the requisite inquiry into defendant's ability to pay the obligation, was proper because the fee is mandatory.

2. APPELLATE COSTS MAY BE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGEMENT OF THE TRIAL COURT AND SHOULD BE ADDRESSED IF THE STATE WERE TO PREVAIL.

RCW 10.73.160(2) states "the court of appeals...may require an adult offender convicted of an offense to pay appellate costs." It has been affirmed many times that an appellate court may provide for the recoupment of costs from a defendant that does not prevail on appeal. *See* ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). As the Court of Appeals for Division I stated in ***State v. Sinclair***, 192 Wn. App. 380, 383-384, 367 P.2d 612 (2016), the award of appellate costs to a prevailing party is within the discretion of the appellate court. *See, also* RAP 14.2; ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000).

The idea that those convicted should be required to pay for the costs of their appeal, including the cost of their appellate attorney, is historical in nature. In 1976[3], the Legislature enacted RCW 10.01.160, which permitted trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, .160(2). In ***State v. Barklind***, 87 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute towards paying for appointed counsel under this statute did not violate, or even "chill" the right to counsel. *Id.*, at 818.

Nolan, 141 Wn.2d 620, noted that in ***State v. Keeney***, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. ***Keeney***, at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. Additionally, the Court noted that RCW 10.73.160 was specifically enacted by the legislature in order to allow the courts to require one whose conviction and sentence is affirmed on appeal to pay appellate costs for the expenses specifically incurred by the state in prosecuting or defending an appeal from a criminal conviction.

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[3] Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

Nolan at 623. In ***Blank***, *supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court's holding in ***State v. Blank***, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. This legislative delamination is deserving of deference.

Most criminal defendants are represented at public expense at trial and on appeal. RCW 10.73.160(3) specifically includes "recoupment of fees for court-appointed counsel." Those defendants with a court-appointed counsel have already been found to be indigent by the court. The statute would be redundant if it was not enacted specifically for the purpose of noting that indigent defendants may be responsible for paying for their court-appointed counsel.

As ***Blazina*** requires, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. However, as ***Sinclair*** points out at 385, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. ***State v. Blank***,

131 Wn.2d 230, 234, 930 P.2d 1213 (1997). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000).

D. CONCLUSION.

The State respectfully requests this Court affirm the trial court's imposition of the criminal filing fee.

DATED: December 29, 2016.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12-29-16 Theresa Kar
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PIERCE COUNTY PROSECUTOR

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